UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS DIVISION

GERALD HESTER,	) CASE NO: 2:09-CV-117-RLH-RJJ
Plaintiff,	) CIVIL
vs.	) Las Vegas, Nevada
VISION AIRLINES, INC.,	) Wednesday, April 14, 2010
Defendant.	) (11:14 a.m. to 11:41 a.m.)

HEARING RE UNOPPOSED MOTION TO EXTEND TIME REGARDING DISCOVERY [105]

BEFORE THE HONORABLE ROBERT J. JOHNSTON,
UNITED STATES MAGISTRATE JUDGE

Appearances: See next page

Court Reporter: Recorded; FTR

Courtroom Administrator: J. Ries

Transcribed by: Exceptional Reporting Services, Inc.
14493 S. Padre Island Drive
Suite A-400
Corpus Christi, TX 78418-5940
361 949-2988

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

APPEARANCES FOR:

Plaintiff: DAVID M. BUCKNER, ESQ.
BRETT VON BORKE, ESQ.
Kozyak Tropin & Throckmorton, P.A.
2525 Ponce de Leon Blvd.
Coral Gables, FL 33134

Defendant: HAROLD P. GEWERTER, ESQ.
2705 Airport Drive
North Las Vegas, NV 89032

ROSS C. GOODMAN, ESQ.
Goodman Law Group
520 S. Fourth Street, 2nd Floor
Las Vegas, NV 89101

Las Vegas, Nevada; Wednesday, April 14, 2010; 11:14 a.m.

(Call to Order)

THE COURT: Good morning. This is Judge Johnston in the case of *Hester versus Vision Airlines, Incorporated*. This is Case Number 2:09-civil-117-RLH-RJJ.

Counsel, if you'll please enter your appearances for the record. Please indicate the party or parties that you represent; any law firm that you're associated with and the city and state that you're in for the call today. Starting with plaintiff's counsel, please?

MR. BUCKNER: Good morning, Judge, David Buckner and Brett von Borke of Kozyak Tropin and Throckmorton for plaintiffs in the class.

MR. GOODMAN: And good morning, your Honor, Ross Goodman, on behalf of the Goodman Law Group on behalf of the class in Las Vegas, Nevada.

MR. GEWERTER: Good morning, your Honor, Harold Gewerter on behalf of the defendant, Vision Airlines, Inc. in Las Vegas, Nevada.

MR. BUCKNER: And my apologies, Judge, David Buckner and Brett von Borke; we're in Miami, Florida.

THE COURT: Thank you. I put this on for a quick conference call in regard to an unopposed motion for extension of time, Number 105, filed by the plaintiff.

Mr. Buckner, perhaps you could explain what it is that was discovered during the course of the taking of the depositions that requires an expert now?

MR. BUCKNER: Your Honor, Mr. Acor, who is the president of the defendant, testified during his deposition that if you added up certain line items in their billing and added up certain line items from their payroll records, that these two sets of numbers would add up and that essentially money coming in for hazard pay, he contends, was paid out -- if those numbers line up.

And so, what we now need, based on that testimony, is to retain an accounting expert to analyze those numbers and determine whether that is, in fact, true. I know the merit of it is not before the Court today, but our analysis shows that it is not. But we're just lawyers. We're going to need an expert to come in and testify to that effect.

And one of the reasons, Judge, we need additional time is not just because this is only recently discovered in the 30(b)(6) depositions, but also because Vision still has not produced to us those documents that it agreed to produce late last year, unredacted in native format with metadata as your Honor discussed with us at our last in person hearing out in Nevada.

And one of the things that we really need in order not to have to come back before the Court and ask for additional time yet again down the road is -- with all due respect -- a ruling from the Court on our motion to compel -- our renewed motion to compel -- from January, because Vision, as we learned during these 30(b)(6) depositions and as set out in our supplement to our renewed motion to compel, which is Document 106 in the file, that Vision really has not undertaken any real effort -- certainly no good faith effort -- to search for and produce response of documents in this case.

And what they have produced, in many cases, is heavily redacted as we've set forth and we respectfully request that the Court grant our motion to compel in addition to the motion for additional time so that we can move forward with this discovery as we've previously discussed.

THE COURT: So, is this a single expert, a CPA, an accountant; what would it be?

MR. BUCKNER: Exactly, Judge. An accountant, probably a CPA, but yes, somebody like that.

MR. GEWERTER: Judge, this is Harold Gewerter. My only concern is if they do that, then I need time to have an expert look at their expert's report.

MR. BUCKNER: And Judge, we don't -- just so I can be clear -- this is David Buckner again -- we're obviously not trying to put Mr. Gewerter in a difficult position with regard to his right to designate an expert with regard to the Court's schedule.

Really, the problem fundamentally is that Vision is in a way running out the clock on this case by not producing the documents they've agreed to produce and that's why we've had to keep coming back to your Honor and asking for additional time. We're hoping not to have to do that, but this is where we find ourselves, unfortunately.

THE COURT: Okay. Let me ask this. Now, there's some documents you're obviously still seeking. I have the renewed motion under submission and would be able to get that decided soon. With the current documents that you have, is your expert able to move forward on the questions that are coming out of these depositions?

MR. BUCKNER: We can move forward on some of it for certain time periods, because Vision has produced some financial records that will enable the expert to begin his analysis.

However, and just as an example, for the later phases of the Air Bridge program when Vision was working with a company called McNeill (phonetic), all we have from Vision are heavily redacted documents where all the numbers have been blacked out with what appears to be a black Magic Marker and that, as I said, is set forth in our submission Document 106.

And so, our expert cannot do the analysis he needs to do in its entirety because we're missing those documents.

MR. GEWERTER: Judge, this is Harold Gewerter. We have produced the entire flight logs. That's what they need, because that's what they're alleging, going flight by flight. Those have been produced. They were produced prior to the 30(b)(6) depositions.

MR. BUCKNER: With all due respect to Mr. Gewerter, Judge, that's not only not everything they've agreed to produce, but it's not sufficient, because their witness testified that you would have to compare money in with money out. The flight logs don't tell you about money in or money out. Payroll tells you about money out and invoices and wire transfers tell you about money in.

We don't have anything after July 15, 2007 reflecting money in and I don't think we even have anything reflecting money out; again, because it is heavily -- the heavy redacting that Vision has done with no basis, frankly, at all.

And, as I said, our expert can do some of the analysis, but until we get all of these documents we've sought, as set forth in our renewed motion and in our supplement, he won't be able to complete his analysis.

THE COURT: Mr. --?

MR. GEWERTER: Your Honor, this is Harold Gewerter.

THE COURT: Yes.

MR. GEWERTER: The reason I disagree so vehemently with this is they kept saying, "We need to know who flew what and when." They get that record. Now they say, "Well, that's not enough now."

They can do an analysis of who flew how many hours and who flew what days and what flights from all the records they have so far. And that's why I agreed to this extension to let them have an expert because all they're going to do is just do simple math. This is bookkeeping math. This is not advanced math they're going to be doing. A bookkeeper can do what they need to get done.

THE COURT: Okay. So, Mr. Buckner, at this point, you're able to identify the hours that were flown or that they were in the air?

MR. BUCKNER: Well, that's what Mr. Gewerter says, Judge. I have no way of knowing that, for sure, because I don't know if their records are complete. As we set out in our supplement to our renewed motion to compel, when we took the last three 30(b)(6) witnesses, none of them knew whether the documents were complete or what efforts Vision had made to gather and produce documents to us, other than the efforts that they themselves had made on their own behalf.

THE COURT: Let me ask this. Let me ask this, Mr. Buckner. Does the plaintiff have any independent logs or records that can enable some kind of a cross check on the information that's been given in terms of the flight logs?

MR. BUCKNER: No, sir, we don't. All we have is whatever Vision has produced to us and whatever we obtained in the Virginia litigation between Vision and the contractors above it in the earlier phase.

And again, it's not enough just to know who flew and when. We're talking about money here, not flight hours. We agreed with Vision late last year, as set forth in Exhibit P to our renewed motion to compel. There's a letter from December 21st of last year where we set forth the agreement among the parties of what Vision would produce in native format with metadata, obviously unredacted. They haven't done that and that's the stuff we need.

But specifically what our expert needs is, again, money coming in in the form of invoices going out and wire transfers coming in and payments going out in terms of payroll. Those are the things we don't have.

Certainly, as to the McNeill phase, it's not -- you know, I know Mr. Gewerter says well, he gave us the flight logs and I'll just assume for the sake of present argument that those are complete, we can't do the analysis we need to do from those alone. And he can't choose which documents we should have to do our work from.

These payroll documents and invoices and things like that are the way any accountant would go about establishing money in and money out. The fact that Mr. Gewerter would prefer we do it a different way is not consistent with our agreement as to what he would produce and it's, frankly, I don't believe possible.

THE COURT: Okay.

MR. GEWERTER: Judge, this is Harold Gewerter. We produced these in the format in which we have them.

THE COURT: Right.

MR. GEWERTER: But they don't like the format, but I can't help that.

THE COURT: You produced what in the format that you have them? Flight --?

MR. GEWERTER: I've produced all the flight records. I've produced payroll records and what has been redacted has been money paid in from McNeill, for example, because that's a flat fee contract and that's because --

THE COURT: Mr. Gewerter?

MR. GEWERTER: I'm sorry, Judge.

THE COURT: Could you back up and say that again? You were going so fast I didn't understand.

MR. GEWERTER: Oh, I'm over in state court on a cell phone. I apologize.

THE COURT: That's okay. What was not shown was what?

MR. GEWERTER: Is there are line items as for monies received from McNeill that have been redacted.

THE COURT: Okay. And why is that redacted?

MR. GEWERTER: Because that's extremely proprietary and confidential and McNeill has informed us through their lawyer that they consider that confidential and secret information.

In fact, Mr. Buckner has filed a subpoena in the Eastern District of Virginia, which is being litigated back there as to whether or not they're going to get those records directly from McNeill.

THE COURT: When is that hearing?

MR. BUCKNER: There is no hearing, Judge. We've served a subpoena on McNeill to try and get these documents, because we've been unable to get them from Vision in this case. And we just can't wait any longer, given that the schedule is moving forward.

There's no date -- they've not moved to quash our subpoena or anything yet. They've indicated that they might. Obviously, the best source of all this information and the party with the obligation to produce it to us is Vision. Their unilateral redactions or selection of documents that they'll produce to us is both inconsistent with the Rules of Civil Procedure and inconsistent with our December 21st agreement that they would produce documents to us.

We have a protective order in this case. You know, unfortunately, what's happening here is Vision is just trying to run out the clock on us. We've certified a class. They know we're headed toward trial. They know we need these documents to prove our case and they're just sitting on their hands, not doing the good faith effort to produce.

MR. GEWERTER: Your Honor, I -- I'm sorry, David, go ahead.

MR. BUCKNER: No -- I'm sorry, Harold. And that's why, again, Judge, and I wish we could resolve this. We thought we had it resolved. Obviously, we don't see eye to eye and that's why we need the Court's intercession with regard to the renewed motion to compel.

THE COURT: Okay.

MR. GEWERTER: Your Honor, what we learned from the deposition of Mr. Hester was that Mr. Hester has no knowledge of anything. So, this so-called protective order that's in place really is bogus. It's bogus because the information is not coming from Mr. Hester. He says it's coming from his lawyers.

So, his lawyers are talking to other people in this case, which would normally have a right to do, except in this case it's a protective order.

So, there's something very nefarious going on here in this case as to when you have the lead plaintiff who has no knowledge of any information whatsoever, effective a motion that's going to be filed hopefully by Monday outlining what happened at Mr. Hester's deposition. It was a complete waste of a day. When I asked the question, "How do you know this information was complete?"

"Talk to my lawyer. I don't know." I got that 20 or 50 times, all day long. And that's why we have in this case here where I think it's the tail wagging the dog. It's backwards in this case. And I want to know who those people are. I kept asking Mr. Hester, "Who are these people out there that have information?"

All I could get was, "Talk to my lawyer." Well, I can't talk to the lawyer, because that's not proper. Although, in the motion he asked us that we talk to the lawyer under oath. That's why I would ask that you hold off until you see the motion. That should be filed by Monday.

THE COURT: Okay. That's fine. I'm willing to look at that. I guess one of the core questions that I go back to in regard to this request for extension is just how it is that at this late date that the plaintiff discovers that they need some kind of an accounting person to tabulate this information; how that couldn't have been recognized much earlier than now.

MR. BUCKNER: Well, Judge, and as I said, Mr. Acor in his testimony is the one who put this issue into play during his 30(b)(6) deposition of a couple of weeks ago. He said that you add up these line items and they all line up and that clearly is going to be in part Vision's defense. It's not a position they've ever articulated before, but he articulated it for the first time in his deposition. And so, we now need to address that.

THE COURT: Well, how --

MR. BUCKNER: But either way, Judge, we still don't have documents from them establishing what specifically in dollar terms they received from McNeill for flying the Air Bridge generally, or with regard to hazard pay. They still are redacting that information. And there's no basis for redacting it.

THE COURT: Okay.

MR. BUCKNER: You have a protective order in this case.

THE COURT: Mr. Buckner, you're mixing apples and oranges here. Let's focus on the issue before the Court today, which is the motion to extend.

If you didn't realize it before the taking of this 30(b)(6) deposition or depositions -- I don't even know how many there were -- how were you intending to present this material without some kind of an accountant or CPA before the deposition?

MR. BUCKNER: Well, Judge, two things. First of all, with regard to that issue, we -- I'm not sure that we needed to present it with a CPA, because we wouldn't have needed to tabulate all these different lines. We would have simply been able to show the amount of money that Vision took in for hazard pay.

And Vision's taken the position -- well, their position has changed over time about whether they paid that out or not. And that's part of the problem with the delay in discovery in this case. In terms of formulating our case in chief, we haven't been able to do that and we still really aren't able to fully do that because Vision hasn't given us the documents nor set forth its position consistently, even though we've asked, you know, repeatedly. We've given them requests for admission and things like that.

So, you know, the thing that's held us up here is the lack of discovery. I don't want to mix apples and oranges. I realize your Honor just wants to hear about the motion for additional time. But it really is all part of a whole. We haven't been able to develop our case.

THE COURT: All right, Mr. Buckner. Mr. Buckner, let me do this, then. Let me back up to my question again. How was the plaintiff going to present this financial information before the 30(b)(6) depositions? That's all I'm asking. How were you going to do that? Were you -- did you have a witness that's going to tabulate these things? Was the plaintiff going to do it himself? Was the attorney going to do it? That's all I'm asking.

The request here is an extension for an expert. You've described the expert as somebody in the financial field and a CPA, an accountant, who will basically tabulate some money coming in and some money going out and whether or not it was in the appropriate source codes or not.

My question is, how was that going to be done before the taking of these depositions? Why the late discovery of the need for this financial expert?

MR. BUCKNER: Yes, sir. Two answers to that. First of all, we might well have used an expert to do it, but until we got the underlying documentation, we didn't know if we needed to. We still don't have the underlying documentation in a lot of this stuff, and so --

THE COURT: Stop there. Stop right there.

MR. BUCKNER: Okay.

THE COURT: If you were going to have documentation, what documentation were you expecting that would do this tabulation for you, because I've never seen it in a case here. Somebody's got to tabulate this information and present it to the trier of fact. Who was going to do that?

MR. BUCKNER: Well, sir, with regard to the earlier phases of this litigation -- with regard to the earlier phases of the Air Bridge, some of it actually is tabulated on some of Vision's billing. I'm not saying we wouldn't have needed an expert to prove that. We might well have. But I now know we need an expert; whereas before I hadn't yet had to make the decision, because I didn't have the discovery in yet.

And I was really hoping that we'd have complete discovery and could make this decision prior to your Honor's deadline, but we just haven't gotten the discovery to be able to do it. And so, we've now made the decision that we are going to need to present it through an expert to tabulate what we hope will be in the additional documents we don't yet have and we just need the additional time to get those documents and get it to the expert.

THE COURT: Okay. So, your answer to my question is, then, before the 30(b)(6) depositions in March, you were not going to use an expert. My question is, who was going to present these tabulations, then?

MR. BUCKNER: I'm not saying I wasn't going to use an expert, Judge. I'm saying that I don't know that we would or wouldn't have. It really would have depended on the total state of the document. But we didn't have to make that decision before that point because we weren't up on a deadline. Now, unfortunately, we are and we can't present our expert with what he needs. We may have used an expert. We might not have. I really don't know, because again, it's hard to make a decision in a vacuum without the underlying evidence.

THE COURT: My question is, who or how would you have presented this without an expert under any scenario? Assume you have all the documents in the world. They're not going to be tabulated for you. Who was going to do that?

MR. BUCKNER: Well, for example, Judge, and I don't want to get too deeply into the documents, but with regard to

Phase 3 of the Air Bridge, in fact, there are some documents showing the total amount of money that Vision received for hazard pay. Assuming Vision's documents are accurate, we wouldn't necessarily have needed anybody to tabulate anything.

I don't know that the McNeill documents are the same. So, I --

THE COURT: Wait a minute. Wait a minute. Stop right there. Stop right there.

MR. BUCKNER: Okay.

THE COURT: Assuming they're accurate, you wouldn't need anything. I thought you were concerned here about money coming in and money going out and making sure it correlates. That's not --

MR. BUCKNER: Well, that --

THE COURT: Let me finish.

MR. BUCKNER: I'm sorry, sir.

THE COURT: Is that not an issue in that circumstance, then? You just accept whatever they give you?

MR. BUCKNER: No, sir.

THE COURT: Well, then, how were you going to do it?

MR. BUCKNER: The issue of money coming in and money going out was raised by their president and CEO in his 30(b)(6) deposition.

THE COURT: That's no surprise to anybody. I could look at this case a year ago and tell you that that was an issue. You've told me in argument here in court that that's an issue. That's no surprise.

How did you really intend to do this without some kind of a financial, accounting expert? I'm really curious.

MR. BUCKNER: Again, Judge, we hadn't made the decision on that yet, because --

THE COURT: I understand that. I understand you hadn't made the decision. So, why didn't you just say in this motion, "We finally made the decision, Judge"? You see? Nobody could look at this case and say that the plaintiff would ever be able to put it on without an accountant or a CPA. There's no way possible, unless you or one of your co-counsel are going to step up and testify or the plaintiff could do it. It doesn't sound like the plaintiff performed very well in the deposition. So, I'm really curious as to how you were going to do it without an expert.

MR. BUCKNER: I don't want to get in an argument about how the plaintiff performed with Mr. Gewerter. I think his characterization of the plaintiff's testimony is totally incorrect, but I know that's not before the Court today.

The fact is, we've decided we need an expert. Your Honor's correct. We do need an expert. But we need the time to get him the documents that we don't yet have from Vision.

THE COURT: Okay.

MR. BUCKNER: And that's all we're asking for.

THE COURT: And the question always here on extensions of discovery is whether there’s good cause for an extension. And we measure good cause in discovery extensions by due diligence. Right?

MR. BUCKNER: Yes, sir.

THE COURT: So, the question is, has there been due diligence to get an expert for this testimony that you need? And so, my question is and it’s an obvious one, why wasn’t there an expert retained earlier?

MR. BUCKNER: Well, Judge, we have an expert. We have someone lined up to do this work.

THE COURT: Who is the expert?

MR. BUCKNER: I’m sorry?

THE COURT: Who is the expert?

MR. BUCKNER: It’s Barry Mukamal. He’s a CPA and accountant here in Miami.

THE COURT: How do you spell that name?

MR. BUCKNER: M-U-K-A-M-A-L. First name is Barry.

THE COURT: I’m sorry. M-U-K --?

MR. BUCKNER: A-M-A-L. And he can do the analysis, as I said. He can even do some of the analysis now. What we don’t have are the documents for him to do the complete analysis.

THE COURT: Okay. Now, we’re getting a little more information. So, it’s not that you discovered during a

30(b)(6) deposition that you need an expert. The issue is you don't have the documents or the information that your expert needs. So, what you really should do, then, is file an affidavit from the expert that says, "Judge, we've got our expert. We're trying to put this together, but here's what we're missing."

MR. BUCKNER: Well, actually --

THE COURT: Right?

MR. BUCKNER: -- it's both, Judge. It's both the newly discovered theory that they're going with and the unavailability of this information. But the unavailability of this information was set out in our motion to compel back in January and, again as I said, in our supplement to it, Document 106. I mean, we've discussed the unavailability and the redactions and everything else in multiple pleadings.

Vision has agreed to produce this to us, they just haven't done it.

THE COURT: Tell me about this newly discovered theory, because I don't see it, but maybe you -- Mr. Gewerter, are you aware of this newly discovered theory that's been revealed by your clients in the 30(b)(6) deposition?

MR. GEWERTER: No, Judge, absolutely not. In fact, our theory has always been that all employees are contract employees. Plaintiff is claiming, "Well, there's this equitable theory out there and we just said, "Fine. You're either going to go with the plaintiff's theory, the numbers still add up." There is no new theory whatsoever that we have presented by the defense.

THE COURT: Mr. Buckner, what is the new theory?

MR. BUCKNER: Judge, their witness came in and for the first time said, "If you add up the total amount of money we took in for payroll, for employee pay and hazard pay, and you add up the total amount of money we paid out to employees for salary, those two numbers line up. And I am certain that that does not appear in any of Vision's pleadings prior to those depositions. That is their new theory. It's not the only reason we need additional time, but it's one of the two reasons. Because we've now heard that for the first time and our expert needs to see if that lines up.

THE COURT: So, they've never said before that where hazard pay was appropriate and due, "We paid it"?

MR. BUCKNER: They've said -- well, they've taken different positions over time as to whether they paid it or not. And you can look at their responses to our requests for admissions, where they kind of go back and forth as to whether they paid it.

But at various times they have suggested that they paid the hazard pay that was due. They have not said if you add up, as I said, payroll money -- the money coming in to pay employees, the money going out to pay employees, including hazard pay, that that will all line up. It doesn't add up. We know from looking at it that it doesn't add up. And that's what's new.

But in addition, we can't even do that calculation for the McNeill phase because they won't give us documents without heavy redactions where all the numbers are removed.

THE COURT: All right. Anything further, Mr. Gewerter, on this motion?

MR. GEWERTER: Nothing further, your Honor.

THE COURT: Mr. Goodman, anything from your position?

MR. GOODMAN: No, your Honor.

THE COURT: All right. Based on what's been presented to the Court at this time, this motion is denied without prejudice. If there's some basis that will be presented to the Court as to why this discovery should be opened, the Court would be receptive to that. But on the face of what's presented here and the argument presented, the Court is not persuaded that there's been due diligence in regard to this particular type of expert that the plaintiff wants to add at this late date and it's denied without prejudice.

Anything further today?

MR. BUCKNER: Just a question, your Honor. When can we expect a ruling on the motion to compel?

THE COURT: Who's speaking?

MR. BUCKNER: I'm sorry. This is David Buckner.

THE COURT: Okay. It just helps our recorder to keep track of who's talking if we know.

MR. BUCKNER: Of course.

THE COURT: I assume relatively soon. But I never make promises in that regard.

MR. BUCKNER: Okay.

THE COURT: Okay?

MR. BUCKNER: Thank you, sir.

MR. GEWERTER: Thank you, your Honor. This is Harold Gewerter. Thank you.

THE COURT: I rarely ask attorneys the same thing, you know. When will you be finished with this case?

MR. BUCKNER: Fair enough.

THE COURT: Yeah. Thank you. We'll be in recess.

(Proceeding was adjourned at 11:41 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Signed — April 20, 2010

Signed Dated

TONI HUDSON, TRANSCRIBER